A

PP

v.

AZHAR CHE WIL & ORS AND ANOTHER CASE

B

HIGH COURT MALAYA, KUANTAN
MOHAMED APANDI ALI J
[CRIMINAL TRIALS NOS: 45(46)-3-2004 & 45-(46)-7-2004]
7 AUGUST 2006

C ***CRIMINAL LAW:*** *Penal Code - Section 302 - Murder - Proof - Kicking and stomping deceased's head against concrete wall and floor - Whether evincing intention to cause death - Whether could cause injuries sufficient in ordinary cause of nature to cause death - Whether guilty of murder - Criminal Procedure Code, ss. 180, 182A(2) - Penal Code,*
D *ss. 300, 302*

CRIMINAL PROCEDURE: *Compounding offences - Consent of court - Causing grievous hurt - Offence compounded on request of parents of deceased victim - Whether allowable - Whether consent to be judiciously granted - Criminal Procedure Code, s. 260 - Penal Code ss. 35, 325*
E

EVIDENCE: *Exhibit - Broken chain of evidence - CCTV tape-recording - Tape-recording of assault and murder within prison compound committed by prison personnel - Record of safekeeping of exhibit not properly kept - Whether inadmissible*

F

The eleven accused in these two cases were prison personnel at the Penor Prison, Kuantan. They were alleged to have assaulted an inmate of the prison ('the deceased') whereof, following the deceased's death, seven of them were charged with murder under
G s. 302 Penal Code ('Case No. 1'), whilst the rest with voluntary causing grievous hurt under s. 325 of the Code ('Case No. 2'). Before the learned judge, at the end of the prosecution's case, evidence was led that the deceased was attempting to escape from the prison on 1 Mac 2004, that he was soon captured by the
H prison personnel and that a series of assault was inflicted on him after his capture. It was also evident that the assault took place at different localities within the prison compound, with each episode involving different number of accused. The evidence aside, to bolster its case, the prosecution also sought to admit into
I evidence a CCTV tape-recording ('P20'), which might have recorded the incidents of the assault. The facts showed however that P20 was only handed to the police some five days after the

alleged assault, and no proper record was kept as to its movement and safekeeping. Be that as it may, evidence was further adduced that: (i) at the Bilik Unit Kawalan Penjara ('UKP'), the 1st accused in Case No. 1 ('1st accused') had repeatedly kicked the deceased and stomped the deceased's head against the concrete wall and floor of the room, whereupon the deceased went into a seizure and lapsed into a coma; (ii) the deceased never recovered from his coma and died on 10 Mac 2004; and (iii) the cause of death was multiple blunt trauma to the head.

Upon the evidence, and the prosecution's admission that there was no case to answer as against the 6th accused, the learned judge acquitted and discharged all the accused in Case No. 1, except for the 1st accused, who was called to enter a defence as per the preferred charge. In the event, it was the 1st accused's defence that the deceased was already so seriously injured when he was brought to UKP by SP7 on his instruction, and in any case, it was SP7 who had inflicted the fatal injuries in question. In the meanwhile, and notwithstanding the prosecution's objection thereto, the parents of the deceased, for reasons undisclosed, sought the court's consent to have the offence against the four accused in Case No. 2 compounded under s. 260 Criminal Procedure Code ('the CPC'). That being the case, questions arose before the learned judge as to: (i) whether P20 could be admitted into evidence; (ii) whether the court ought to grant consent for the offence under s. 325 to be compounded; and (iii) whether murder had been proved against the 1st accused beyond reasonable doubt.

Held (granting consent; convicting 1st accused; acquitting and discharging all other accused):

(1) There was a lacuna as to the actual movement and safekeeping of P20 between the time it was recorded on 1 March 2004 and the time it was handed to the police on 6 March 2004. Apart from its movement not being recorded by those handling it, the manner of its keeping while in custody of the prison authorities was also contrary to the accepted procedure and practice. Hence, upon the authorities of *R v. Maqsud*, *R v. Robson*, *R v. Dodson and Mohd Ali Jaafar v. PP*, P20 is inadmissible in evidence. (paras 22, 23 & 24)

(2) The only incident that clearly indicated where, when and how the said fatal injury was inflicted on the deceased was the incident at UKP. In all the other incidents, there is no evidence to show such "multiple blunt trauma" to the head that could possibly cause haemorrhage to the brain. Consequently, the prosecution had failed to prove a *prima facie* case against accused No. 2, 3, 4, 5 and 7 in Case No. 1. (paras 26 & 30)

(3) The offence of voluntarily causing grievous hurt under s. 325 of the Penal Code is compoundable as it falls under Part B as mentioned in s. 260(2) CPC. Such composition must be with the consent of the court, a *fortiori* when the case is already before the court. On the facts, the parents of the deceased are empowered to compound the offence on behalf of their deceased son pursuant to s. 260(4) CPC. (paras 8 & 15)

(4) The court should lean towards granting consent where public interest does not figure strongly. In this case, the deceased was injured when he was recaptured after an abortive attempt to escape and the injury was caused in the course of the accused persons executing their duty. The fact that the accused persons were prison personnel did not give rise to public interest. There was thus no public interest arising from the incident. (paras 10 & 18)

(4a) As the parties had voluntarily agreed to have the offence compounded, and as there is no real injury to the State or any issue of public interest arising, there is no reason why consent should be withheld. In the circumstances, the court would grant consent sought for and consequential to that would invoke s. 260(5) CPC and acquit and discharge the four accused in Case No. 2. (paras 18 & 19)

(5) The evidence of the repeated assaults on the head of the deceased is sufficient to prove intention within the meaning of the third limb of s. 300 Penal Code. The hard kicking and stomping of the head against a hard surface like a concrete wall, and repeatedly at that, could certainly cause injuries that is sufficient to cause death in the ordinary course of nature. Consequently, at the end of the prosecution's case, only the 1st accused ought to be answerable for causing the death of the deceased. (paras 26 & 27)

(6) The defence has failed to raise a reasonable doubt on the prosecution's case. Accordingly, the court found the 1st accused guilty of murder and sentenced him to death by hanging. (para 37)

[The 1st accused has since appealed against his conviction and sentence vide Criminal Appeal No. C-05-27-2006; Likewise, the Public Prosecutor has appealed against the decision to give consent and the acquittal of 2nd, 3rd, 4th, 5th and 7th accused in Case No. 1 vide Criminal Appeals No. C-05-93-2006 and No. C-05-94-2006 respectively]

Case(s) referred to:

Daud Kalam v. PP [1937] MLJ xlvii ***(refd)***
Kee Leong Bee & Anor v. PP [1999] 3 SLR 190 ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mohamed Yasin Hussin v. PP [1976] 1 MLJ 156 ***(refd)***
Mohammad Mansoor v. Hira Singh AIR [1959] All 627 ***(refd)***
Mohd Ali Jaafar v. PP [1998] 4 CLJ Supp 208 HC ***(refd)***
PP v. Norzian Bintal [1995] 3 SLR 462 ***(refd)***
R v. Dodson [1984] 1 WLR 971 ***(refd)***
R v. Maqsud Ali [1965] 2 AII ER 464 ***(refd)***
R v. Robson [1972] 1 WLR 651 ***(refd)***
Rajinder Singh v. The State (Delhi Admin) AIR [1980] Supreme Court 1200 ***(refd)***
Rajwant Singh v. State of Kerala AIR [1966] SC 1874 ***(refd)***
Ram Shanker & Ors v. State of Uttar Pradesh [1982] 3 Supreme Court cases 388 ***(refd)***
Singheshwar Prasad v. Ali Hassan AIR [1929] Patna 512 ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 180(1), 182A(2), 183, 260(2), (4), (5), 277
Federal Constitution, art. 8(1)
Penal Code, ss. 35, 300, 302, 325

Indian Code of Criminal Procedure 1973 [India], ss. 320(4), 325

Other source(s) referred to:

Hamid's On Criminal Procedure, 2nd edn, p 561

For the accused - *Syed Azimal Amir Syed Abu Bakar (Rizal Chek Hashim with him); M/s Syed Azimal Ramli & Rizal*
S Vendargon (R Sarengapani with him); M/s Vendargon & Partners
Shukri Mohamed; M/s Wan Haron, Shukri & Nordin

Mohd Najid Husain (Rosli Yusof with him); M/s Mohd Najid & Partners
Richard Bong; M/s Bong & Co
Bob Arumugam; M/s Bob S Arumugam & Co

For the prosecution - Azmi Ariffin DPP (Hamidon Abdul Fatah DPP with him)

Reported by WA Sharif

JUDGMENT

Mohamed Apandi Ali J:

Introduction

[1] This is a case where two criminal trials were jointly tried, namely Kuantan High Court Criminal Trial No: 45-(46)-3-2004 and Kuantan High Court Criminal Trial No: 45-(46)-7-2004, hereinafter for ease of reference is referred to as Case No. 1 and Case No. 2 respectively. In Case No. 1, seven accused persons were charged for murder, under s. 302 of the Penal Code and read together with s. 35 of the Penal Code, whereas in Case No. 2, four accused persons were charged for causing grievous hurt under s. 325 of the Penal Code and read together with s. 35 of the Penal Code. All the accused persons in both cases are prison officers and personnels from Penor Prison in Kuantan.

[2] In the course of the joint trial, there were three substantive decisions that gave birth to the three appeals in these cases. The three decisions and consequential appeals are:

(a) Decision to give consent by the court for the offence, under s. 325 of the Penal Code to be compounded. This is in respect of Case No. 2 only and the appeal is by the Public Prosecutor. The offence was compounded under the provisions of s. 260(2) of the Criminal Procedure Code.

(b) Decision of no case to answer in respect of accused No. 2, 3, 4, 5 and 7 in Case No. 1, and the appeal is also by the Public Prosecutor; and lastly,

(c) the conviction and sentence of the first accused person at the end the trial in Case No. 1 for murder under s. 302 of the Penal Code. The appeal is by the accused and convicted person.

[3] As there are three separate appeals, I shall give my reasons in respect of the above said decisions in their respective order of events and as listed above.

Compounding Of Offence Under s. 260(2) CPC

[4] During the initial stages of the joint trial, namely after the prosecution has completed with their second witness, it was brought to the attention of the court by the defence counsel in Case No. 2 that all the four accused persons (in Case No. 2) has agreed with counsel holding watching brief for the deceased person's family, to have their offences compounded under the provision of s. 260 of the Criminal Procedure Code.

[5] After hearing submissions from all the learned defence counsels in Case No. 2, the learned Deputy Public Prosecutor and the watching brief counsel, I gave consent for the offence to be compounded and consequential to that composition, the four accused persons in Case No. 2 were acquitted and discharged. This decision and order was made on 17 August 2004.

[6] The Public Prosecutor was not happy with the said granting of the consent and filed the notice of appeal on 1 September 2004. The notice of appeal was filed late. Upon realising that the notice of appeal was filed out of time, the Public Prosecutor then filed a motion in the Court of Appeal *vide* Application No. C-07-7-2004 for extention of time to file the notice of appeal. The Court of Appeal allowed the motion on 1 November 2004 and ordered that the Public Prosecutor be given 14 days from that date to file the notice of appeal. From the records in Kuantan High Court, no fresh or new notice of appeal was ever filed pursuant to the Court of Appeal's decision on the motion for extension of time given on 1 November 2004.

[7] Acknowledging that it is not for me to dwell into the validity or otherwise of this particular appeal, *vis-a-vis* the notice of appeal that was still dated prior to the Court of Appeal's decision to grant extention of time to file notice of appeal, I shall nevertheless give my grounds of judgment pertaining to the compounding of the offence, which is the bone of contention in this particular appeal.

[8] Offences under the Penal Code that can be compounded are as encompassed under the provisions of s. 260 of the Criminal Procedure Code. Section 260 of the CPC reads as follows:

Compounding offences

260. (1) The offences punishable under the Penal Code described in the first two columns of Part A may, when no prosecution for such offence is actually pending, be compounded by the person mentioned in the third column of Part A; or when a prosecution for such offence is actually pending, be compounded by the person with consent of the Court before which the case is pending.

(2) The offences punishable under the Penal Code described in Part B may, with the consent of the Court before which the case is pending, be compounded by the person to whom the hurt has been caused.

(3) When any offence is compoundable under this section the abetment of the offence or an attempt to commit the offence (when the attempt is itself an offence) may be compounded in like manner.

(4) When the person who would otherwise be competent to compound an offence under this section is not competent to contract any person competent to contract on his behalf may compound the offence.

(5) The composition of an offence under this section shall have the effect of an acquittal of the accused.

(6) No offence under the Penal Code not mentioned in this section shall be compounded.

The offence of voluntarily causing grievous hurt under s. 325 of the Penal Code is compoundable as its falls under Part B as mentioned in s. 260(2) of the CPC. Such composition must be with the consent of the court, a *fortiori* when the case is already before the court. However because of the usage of the word "may" in that sub-section, the granting of the consent is a discretion of the court. Such discretion must of course be given judiciously, based on the law and accepted principles and practice.

[9] What is the rationale for certain criminal offence to be classified as compoundable? Out of the 500 odd offences under the Penal Code, only 23 offences are compoundable. In the textbook, *Hamid's On Criminal Procedure*, 2nd edn at p. 561, the author wrote: "The basis of classification of offences compoundable with the sanction of the court, and offences not compoundable at all is the degree of wrong done to the State by the commission of the offence."

[10] This principle has been followed and given effect in the case of *Daud bin Kalam v. PP* [1937] MLJ xlvii (which held that it is the duty of the court to give effect to the compounding provision in any law or enactment as it is not contrary to public policy), and in *PP v. Norzian bin Bintal* [1995] 3 SLR 462 (which held that the Public Prosecutor cannot object to a proposal to compound and that court should lean towards granting consent where public interest does not figure strongly.) The issue of public interest was also highlighted in the case of *Kee Leong Bee & Anor v. PP* [1999] 3 SLR 190.

[11] The Public Prosecutor argued that since the accused persons are Prison Personnels it gave rise to public interest. What is public interest? *Stroud's Judicial Dictionary* defines public interest as: "A matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement; but that in which a class of community have a pecuniary interest or some interest by which their legal rights or liabilities are affected." It was also argued that since the incident happened within the prison area, it gives rise to public interest.

[12] Since the accused persons are prison personnels must they be subjected to different set of rules in order for their offences to be compounded? I do not think so. Basic reference to art. 8(1) of the Federal Constitution which reads: "All persons are equal before the law and entitled to equal protection of the law," will answer such question. To my mind, personalities do not matter, it is the type of offence that matters.

[13] To compound any compoundable offence under the Penal Code is a right exercisable by the victim of the offence or if he is incapable or not competent of exercising such right, it can be exercised by any person competent to contract on his behalf may compound the offence.

[14] On the facts of this case, the injured person was deceased and the contract (or agreement to compound) was made by the parents of the deceased. During the proceedings this court made sure that the parents who were present in court did understood the implications, consequence and effect of the composition of the offence. They understood and confirmed the terms of the composition.

[15] The parents of the deceased are empowered to compound the offence on behalf of their deceased son under the provisions of s. 260(4) of the Criminal Procedure Code. Our s. 260(4) is in para material to s. 320(4) of the Indian Code of Criminal Procedure 1973. However in the Indian Code, it is more illustrative as to when the person injured is incompetent and who would then be the competent person in the even of incompetency. To illustrate this it is appropriate to quote s. 320(4) of the Indian Code of Criminal Procedure 1973, which reads as follows:

> (4) (a) When the person would otherwise be competent to compound an offence under this section is under age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf may, with the permission of the Court, compound such offence.
>
> (b) When the person who would otherwise be competent to compound an offence under this section is dead, the legal representative as defined in the Code of Civil Procedure 1908 (5 of 1908), of such person may with the consent of the Court, compound such offence.

[16] In view of the above cross reference to the laws in the Indian jurisdiction for purposes of examining the issue of competency and with the lack of Malaysian cases on this issue, I conclude that the parents of the deceased person is competent to compound or to contract on his behalf.

[17] While hovering within the Indian jurisdiction, it is also appropriate to refer to a few of their decided cases on compounding of criminal offences under the Penal Code. In the case of *Singheshwar Prasad v. Ali Hassan* AIR [1929] Patna 512 it was held that when the case has been compounded with the permission of the court, the composition does not mean hushing up the matter. In another case, *Rajinder Singh v. The State (Delhi Admin.)* AIR [1980] Supreme Court 1200, it was held that the offence under s. 325 of the Indian Penal Code can be compromised by the parties and permission is given to compound the offence. A similar decision was also given in *Ram Shanker and Others v. State of Uttar Pradesh* [1982] 3 Supreme Court cases 388.

[18] Applying the law to the facts of the case, which at that particular stage of trial can only be elicited through the opening speech of the prosecution, it is my finding that the deceased was injured when he was recaptured after an abortive attempt to escape from the Penor Prison and that such injury was caused in

the course of the accused persons executing their duty. There is no public interest that arises from the incident. As the terms of the composition has been explained to this court and a document executed by both parents in the form of statutory declarations have been tendered in court (marked as exhs. CCI A-B) and after questioning them in court, I am satisfied that the parties had voluntarily agreed to have the offence compounded. It was held in *Mohammad Mansoor v. Hira Singh* AIR [1959] All 627 that once the parties tender into court in writing that a composition of a compoundable offence and that after the court having being satisfied that the parties did sign the document and understood the contents, the court must give effect to the composition.

[19] In view of the above and having concluded that there is no real injury to the State and in the absence of any public interest, I see no reason why consent should be withheld. I therefore granted the consent to have the offence against all the four accused in the Case No. 2 compounded and consequential to that pursuant to the provisions in s. 260(5) of the Criminal Procedure Code, all the four accused persons were accordingly acquitted and discharged.

Decision At The End Of The Case For Prosecution

[20] After the offence in Case No. 2 was compounded under s. 260(2) of the Criminal Procedure Code, the trial proceeded with Case No. 1 only, ie, case No. 45(46)-3-04, where seven accused persons were charged with murder. All the accused persons, as in Case No. 2, are officers and Personnels of the Penor Prison, Kuantan.

[21] At the end of the prosecution's case, but before hearing submissions, the learned Deputy Public Prosecutor conceded that there is no *prima facie* case against the accused person No. 6. Accordingly, without further delay, whereby in such a situation the said accused person, need not remain the dock a minute longer, I forthwith acquitted and discharged the accused person No. 6; before proceeding to hear submissions from the counsels of the other accused persons.

[22] Prior to making the decision at the end of the case for the prosecution, the court has to make a ruling as to the admissibility of a piece of evidence, namely a CCTV tape-recording, marked as P20. After hearing submissions on this issue by all parties, I made the following finding of fact in respect of the said tape-recording:

(a) There is the lacuna or want in the evidence as to the actual movement and safe keeping of the tape-recording before it was handed over to the police and before it was tendered in court as an exhibit.

(b) The manner of keeping the tape-recording while in the custody of the prison authorities was contrary to the accepted procedure and practice, and that the tape was not in safe custody.

(c) The various movements of the tape-recording, while in the custody of the prison authorities were not recorded anywhere by those handling the tape.

(d) The recording was made at about 4.30pm on 1 March 2004, and later it was taken to Kuantan and then to Kajang Prison and later it was back again to Kuantan Prison, and it was only handed over to the police some five days later, on 6 March 2004.

(f) There are broken-chains in the evidence in respect of the movements and safe custody of the tape.

[23] Besides the above negative elements against the exhibit, it is also my finding that there are evidence that created reasonable doubt as to the authenticity and originality of the tape-recording.

[24] In the light of the above findings and persuaded by the principles in the cases of:

R v. Maqsud Ali [1965] 2 All ER 464;

R v. Robson [1972] 1 WLR 651;

R v. Dodson [1984] 1 WLR 971; and

Mohd. Ali Jaafar v. PP [1998] 4 CLJ Supp 208.

I concluded that the CCTV tape-recording (P20) was inadmissible as evidence in the trial.

[25] After hearing the submissions at the end of the prosecution's case and having applied the maximum evaluation of the evidence, as guided by the case of *Looi Kow Chai & Anor v. PP* [2003] 2 MLJ 65, I made the following findings of fact:

(a) There is such a person as named in the charge that has died; A

(b) That the death of that person was caused by serious injury to the head that resulted in sub-arachnoid haemorrhage in the brain area. According to the pathologist and Forensic expert SP6 , Dr. Zahari bin Noor, the injury to the head was caused by multiple blunt trauma to the head; B

(c) The deceased, Mohd. Shukri bin Mohd. Yusof K.P. No. 850404-06-5179 was a detainee who escaped from Penor Prison and his escape and re-capture started at about 4.10pm on 1 March 2004; C

(d) From the flow of events on that day, the incidents involving all the accused persons in Case No. 1, can be segmented into four incidents, according to the chronological order of events, as follows: D

(i) In an area, within the Penor Prison compound, known as Zone Nenas where the deceased was first apprehended. In this incident, only accused No. 3 was implicated.

(ii) At the football field of the Penor Prison, where the deceased was alleged to have tried to struggle free but was prevented from doing so. In this incident, accused No. 4 and 5 were implicated. E

(iii) At the main gate of Penor Prison, where the deceased was assaulted by accused No. 2 and 7; and F

(iv) Lastly the incident at the Bilik Unit Kawalan Penjara (UKP) whereby it implicated only the accused No. 1.

G

[26] It is to be noted that by reflecting on the actual cause of death, namely the multiple blunt trauma to the head, the only incident that clearly indicate **where, when and how** the said fatal injury was inflicted on the deceased was only the incident at the Bilik Unit Kawalan Penjara (UKP). In all the other incidents, there is no evidence to show such "multiple blunt trauma" to the head that can possibly cause the haemorrhage to the brain. By going through the process of elimination through the filtering process of combing the evidence adduced by the prosecution, I find that at the end of the process only the accused No. 1 should be answerable for causing the death of the deceased. The intention to cause such serious injury leading to death can be seen from the H I

manner the head of the deceased was kicked and stomped against the concrete wall and floor, where the assaults took place. The intention to cause the serious injury to the head can be seen by the uncontrollable kicks and stomping of the head. Every Tom, Dick and Harry, as human beings, is fully aware that the head is a vulnerable and vital part of a human being. One need not be in the medical field to know such basic fact. It therefore follows that any hard kicking and stomping of the head and especially repeatedly against a hard surface like a concrete wall or a concrete floor, can cause injuries that is sufficient to cause death in the ordinary course of nature.

[27] The evidence of the repeated asssaults on the head of the deceased is sufficient to prove intention within the meaning of the 3rd limb of s. 300 of the Penal Code. Illustrations of the 3rd limb of s. 300 of the Penal Code, can be seen in the case of *Rajwant Singh v. State of Kerala* AIR [1966] SC 1874 at p. 1878 which held that:

> The Third Clause discards the test of subjective knowledge. It deals with acts done with the intention of causing bodily injury to a person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. In this clause the result of the intentionally caused injury must be viewed objectively. If the injury that the offender intends causing and does cause is sufficient to cause death in the ordinary way of nature of the offence is murder whether the offender intended causing death or not and whether the offender had subjective knowledge of the conseques or not.

[28] It was also so explained in the case of *Mohamed Yasin bin Hussin v. PP* [1976] 1 MLJ 156 at p. 157, where the Privy Council said: "... he intended to inflict upon her the kind of bodily injury which, as a matter of scientific fact, was sufficiently grave to cause death of a normal human being of the victim's apparent age and build even though he himself may not have had the sufficient medical knowledge to be aware that its gravity was such as to make it likely to prove fatal."

[29] Wherefore at the end of the case for the prosecution, I concluded that there is a *prima facie* case made out against the 1st accused person and pursuant to s. 180(1) of the Criminal Procedure Code, I call upon the 1st accused person to give his defence for a charge under s. 302 of the Penal Code.

[30] At the same time upon making the finding that the prosecution has failed to prove a *prima facie* case against accused persons No. 2, 3, 4, 5 and 7; they were all acquitted and discharged, under the provisions of s. 180(2) of the Criminal Procedure Code.

Conviction And Sentence Of The 1st Accused Person For Murder

[31] Before I deal with the decision, to recap the facts and flow of events relating to the case, it is proper to state very briefly the facts of the case.

[32] Briefly, the facts are: On 1 March 2004, the deceased, a young boy of 19 years who was detained under a remand order at the Penor Prison, Kuantan tried his luck to escape from the prison at about 4.10pm. His attempt was immediately realised by the prison authorities and alarm was sounded. All prison officers and personnels within the prison responded and they swung into action. By about 4.45pm. they managed to recapture the escapee and brought him to the main gate. The deceased was first caught in an area known as Zon Nenas, near the prison officers quarters, and later brought to the main gate by passing through a football field. (In the course of the trial the court together with the prosecution and counsels visited the Penor Prison to have an insight of the various places named during the trial.) After the deceased was assaulted by a few prison officers at the main gate, the deceased was taken to a lock-up. He walked to the lock-up accompanied by prison officers. At about 5.20pm the 1st accused directed SP7, Razali bin Fauzi to bring the deceased person to the Bilik Unit Kawalan Keselamatan Penjara. The 1st accused was the Head of that Unit and SP7 worked under him. SP7 complied with the directive and took the deceased to the bilik Unit Kawalan Keselamatan Penjara. The deceased walked to the bilik Unit Kawalan Keselamatan Penjara, followed behind by the 1st accused. While on the way to the room, they were met by Warden Khatijah who cautioned them that the deceased was her relative. Upon arrival at the room, there were four other wardens, all of whom were ordered to leave the room by the 1st accused. The deceased was seated on the floor with his hands handcuffed at the back. Suddenly, for no apparent reason, the 1st accused person kicked and stomped on the head of the deceased a couple of times. The deceased's head hit the concrete wall and concrete floor of the room. SP7 saw blood coming out from the mouth of

the deceased and the deceased went into a seizure and lapsed into a coma. The prison medical assistant was then called, who then advised that the deceased be taken to hospital. Deceased was sent to the hospital at about 7pm. He remained in coma and never regained consciousness, until he died on 10 March 2004.

[33] From the evidence adduced, at the end of the trial, after making my findings at the end of the prosecution's case, as illustrated above, I then again, made a maximum evaluation of all available evidence. In doing so, the evidence of the accused person was tested against the evidence of the prosecution witnesses. The testing of the evidence was particularly crucial in this case because most of the witnesses are fellow personnels from the same prison where the accused person was serving as an officer.

[34] The defence attempted to come up with a story to say that the deceased was already so seriously injured before he was brought into the bilik Unit Kawalan Keselamatan Penjara. The accused said that the deceased had to be propped up and given assistance to walk from the lock-up to the room. However such story did not tally with what was narrated by his fellow prison personnels, such as SP7, Razali bin Fauzi; SP10, Supian Yadi and even the relative of the deceased, SP9, Khatijah bt Adam. All these witnesses corroborated SP7's version of the physical condition of the deceased before he was brought into the room.

[35] The learned defence counsel also questioned the credibility of the eye-witness, SP7, Rozali bin Fauzi and even suggested that it was SP7 who assaulted the deceased. However the suggestion and subsequent story of the accused that it was SP7 who assaulted the deceased in the room of Unit Kawalan Keselamatan, was never told or informed by the accused to any other prison officers, especially his superiors. As such the version of the accused could not possibly hold water. From the evidence adduced and from the manner evidence was given I find that SP7, who is a subordinate to the accused and under the same unit, is a truthful witness. There is not an iota of evidence that can conjure a picture of any possible animosity or enmity between SP7 and his superior, the accused person, for SP7 to falsify or create stories for purposes of implicating the accused person.

[36] Any way, the story of the accused person trying to give a written report of the events to SP7 before SP7 gave his statement to the police will surely reduce the probative value of his story. Such attempt by the accused person is an indication of fear. To my mind, it is a fear of the truth. As I have said earlier, SP7 is a truthful witness.

[37] As such, after analysing the evidence as a whole and having considered all the submissions and bearing in mind that the burden on the defence is only to raise a reasonable doubt on the prosecution's case, I conclude that the defence has failed to do so. Accordingly pursuant to the provisions of s. 182A(2) of the Criminal Procedure Code, I find that the accused guilty as charged, and convicted him; and pursuant to s. 183 of the Criminal Procedure Code, the accused person is sentenced under s. 302 of the Penal Code which is to be read with s. 277 of the Criminal Procedure Code, namely that the accused is sentenced to death by hanging.